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## State v. Bitkoff Respondent's Brief Dckt. 40915

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

STATE OF IDAHO,	)	
	)	Nos. 40915, 41205
Plaintiff-Respondent,	)	
	)	Valley Co. Case No.
vs.	)	CR-2009-2472
	)	
AARON BITKOFF,	)	
	)	
Defendant-Appellant.	)	

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**BRIEF OF RESPONDENT**

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APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF VALLEY

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HONORABLE THOMAS F. NEVILLE  
District Judge

---

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**APR 15 2014**

Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
Entered on ATS by \_\_\_\_\_

## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature Of The Case .....	1
Statement Of The Facts And Course Of The Proceedings .....	1
ISSUE .....	3
ARGUMENT .....	4
Bitkoff Has Failed To Show Error In The District Court's Denial Of His Request For Credit For Time Served To Which He Was Not Entitled .....	4
A.    Introduction.....	4
B.    Standard Of Review .....	5
C.    As A Fugitive, Bitkoff Was Not Entitled To Credit For Time Served In Nevada, On Offenses Committed In Nevada, While Awaiting Extradition Back To Idaho.....	5
CONCLUSION .....	10
CERTIFICATE OF SERVICE.....	11

## **TABLE OF AUTHORITIES**

### **CASES**

### **PAGE**

<u>State v. Covert</u> , 143 Idaho 169, 139 P.3d 771 (Ct. App. 2006).....	5
<u>State v. Kesling</u> , 155 Idaho 673, 315 P.3d 861 (Ct. App. 2013) .....	7, 8
<u>State v. Sanchez</u> , 149 Idaho 102, 233 P.3d 33 (2009) .....	9
<u>State v. Vasquez</u> , 142 Idaho 67, 122 P.3d 1167 (Ct. App. 2005) .....	5

### **STATUTES**

Idaho Code § 18-309.....	7
Idaho Code § 19-2602 .....	5
Idaho Code § 19-2603 .....	3, 5, 7, 10

## STATEMENT OF THE CASE

### Nature Of The Case

Aaron Louis Bitkoff appeals from the district court's order revoking his probation for his underlying offense of burglary, and the court's order denying Bitkoff's motion for additional credit for time served. On appeal, he argues that the district court erred by not giving him credit for time served in Nevada on convictions entered in Nevada arising from separate crimes committed in Nevada while on an extradition hold from Idaho.

### Statement Of The Facts And Course Of The Proceedings

In 2009, Bitkoff was convicted of burglary and sentenced to a unified term of six years with two years fixed. (R., pp.74-76.) The district court retained jurisdiction and, after the period of retained jurisdiction, placed Bitkoff on probation for a term of five years. (R., pp.86-90.) Under an interstate compact agreement, Bitkoff's probation was transferred to Nevada. (See R., p.148.) While in Nevada, Bitkoff absconded probation and committed several new felonies. (PSI, pp.123-26.) As a result of these new crimes, the state alleged that Bitkoff violated the terms of his probation. (R., pp.148-49.) The district court issued a bench warrant ordering any sheriff, constable or peace officer of the State of Idaho to take Bitkoff into custody, and a nationwide fugitive warrant was placed in the NCIC. (R., pp.167-68; see also R., p.201; PSI, pp.123-25.)

On December 29, 2011, Bitkoff was arrested in Nevada on his several Nevada charges and the national fugitive warrant. (PSI, p.125.) Bitkoff was ultimately convicted for his Nevada crimes and served 13 months of what appears to have been a four-year sentence before being paroled. (See PSI, p.127; Tr., p.37, L.25 – p.38, L.13.) Bitkoff was then extradited back to Idaho and was immediately served with the bench warrant

on February 5, 2013. (R., pp.171, 178.) On February 14, 2013, Bitkoff admitted that he violated his probation by absconding supervision. (R., pp.179-80; Tr., p.22, Ls.9-17.) The district court revoked Bitkoff's probation and executed his underlying sentence of six years with two years fixed, with credit for 364 days served. (R., pp.213-15.)

Bitkoff filed a Rule 35 motion for correction of an illegal sentence, asserting that he was entitled to credit for the time he served in custody in Nevada on the crimes he committed there. (R., pp.206-08, 217-18.) The district court denied Bitkoff's motion. (R., p.208.) Bitkoff filed a timely notice of appeal. (R., pp.228-31.)

## ISSUE

Bitkoff states the issue on appeal as:

Did the district court err when it denied Mr. Bitkoff credit for time served, as I.C. § 19-2603 requires a district court to award credit for time served from the date a bench warrant is served for a probation violation?

(Appellant's brief, p.4.)

The state rephrases the issue as:

A fugitive is not entitled to credit for time served in a separate jurisdiction, on a separate offense, while awaiting extradition back to Idaho. Has Bitkoff therefore failed to show error in the district court's denial of his request for credit for time served to which he was not entitled?

## ARGUMENT

### Bitkoff Has Failed To Show Error In The District Court's Denial Of His Request For Credit For Time Served To Which He Was Not Entitled

#### A. Introduction

While serving probation in Nevada on an interstate compact agreement, Bitkoff absconded and committed several new felonies in violation of his probation. After Bitkoff served his sentences on his Nevada crimes, he was extradited back to Idaho to answer for his probation violations. Bitkoff admitted the violations and the district court revoked his probation and executed his underlying sentence, crediting him 364 days for time served. (R., pp.213-15.) Bitkoff filed a Rule 35 motion for correction of an illegal sentence, asserting that he was also entitled to credit for the time he served in Nevada. (R., pp.206-08, 217-18.) The district court denied Bitkoff's motion noting that "[i]n general, credit starts when a warrant is issued on Defendant, but not when a 'hold' is placed on Defendant in custody in another jurisdiction." (R., p.208.)

On appeal, Bitkoff argues that he is entitled to credit for the time he served in custody in Nevada on the convictions entered in Nevada for the crimes he committed in Nevada because he was arrested, in part, on Idaho's fugitive warrant. (Appellant's brief, pp.5-11.) Application of the correct legal standards to the facts of this case, however, shows that Bitkoff is not entitled to credit for time served on crimes committed in another state. The district court awarded Bitkoff credit for all of the time to which he was entitled and its order should be affirmed.



B. Standard Of Review

“The question of whether a sentencing court has properly awarded credit for time served to the facts of a particular case is a question of law, which is subject to free review by the appellate courts.” State v. Vasquez, 142 Idaho 67, 68, 122 P.3d 1167, 1168 (Ct. App. 2005) (citation omitted)). “We defer to the trial court’s findings of fact, however, unless those findings are unsupported by substantial and competent evidence in the record and are therefore clearly erroneous.” State v. Covert, 143 Idaho 169, 170, 139 P.3d 771, 772 (Ct. App. 2006).

C. As A Fugitive, Bitkoff Was Not Entitled To Credit For Time Served In Nevada, On Offenses Committed In Nevada, While Awaiting Extradition Back To Idaho

Idaho Code § 19-2602 provides that when a district judge is satisfied that a probationer has violated the terms and conditions of probation, “the court may ... issue a bench warrant for the rearrest of the defendant.” Idaho Code § 19-2603 governs credit for time served in relation to the revocation of probation and provides, in pertinent part, that when probation is subsequently revoked,

the original judgment shall be in full force and effect and may be executed according to law, and the time such person shall have been at large under such suspended sentence shall not be counted as a part of the term of his sentence, but the time of the defendant’s sentence shall count from the date of service of such bench warrant.

Thus, under the plain language of the statutes, Bitkoff was only entitled to credit for time served from the date of service of the district court’s bench warrant. According to the record, the bench warrant was served on February 5, 2013. (R., pp.171, 178.) The district court gave Bitkoff credit for time served from February 5, 2013 through his

disposition hearing, in addition to his prior credit. Therefore, Bitkoff received all of the credit for time served to which he was entitled.

On appeal, Bitkoff argues that he is entitled to credit for the time he served in Nevada on convictions entered in Nevada for crimes committed in Nevada because, he asserts, he was arrested on the warrant from Idaho. (Appellant's brief, pp.9-11.) While the Nevada officials were certainly aware of Bitkoff's probation violation and the nationwide fugitive warrant for his arrest (see R., pp.200-05), that was not the only basis for Bitkoff's arrest. In fact, Bitkoff was arrested on December 29, 2011, on independent charges from Nevada of multiple counts of burglary, obtaining credit cards without their owner's consent, identity theft, and conspiracy to commit larceny. (PSI, p.125.) After arresting Bitkoff, the Nevada officials contacted their Idaho counterparts, who had issued the nationwide fugitive warrant based on Bitkoff's absconding violation. (R., p.201; PSI, p.125.) Those Idaho officials "stated the State of Idaho currently has a probation violation hold on the defendant as the result of the instant offense," however, they would "wait for the disposition of the instance offense before deciding whether or not to extradite" Bitkoff. (PSI, p.125.)

In the Nevada cases, Bitkoff agreed to plead guilty to the conspiracy to commit grand larceny charge in exchange for dismissal of his other Nevada charges, and stipulated with the State of Nevada to a sentence of four years with one year fixed. (PSI, p.127.) With credit for 90 days time served from his arrest in Nevada to his Nevada sentencing date of March 29, 2012 (see PSI, pp.121, 127), Bitkoff served 13 months on his Nevada sentence before being paroled (Tr., 37, L.25 – p.38, L.7). The

time Bitkoff served in Nevada was for his crimes committed while in Nevada, not for the Idaho probation violation which he still faced. (See PSI, p.127.)

Idaho Code § 18-309 entitles a defendant to credit for time served “for any period of incarceration prior to entry of judgment, if such incarceration was for the offense or an included offense for which the judgment was entered.” Though this statute only applies to pre-judgment credit for time served, the legal principle it espouses, that a defendant is only entitled to credit “*for the offense or an included offense*,” is still relevant to the Court’s application of Idaho Code § 19-2603 in this case. Bitkoff has failed to show that he was held in Nevada by the State of Idaho beyond the end of his Nevada sentences. He has failed to show that he could have bonded out on the several Nevada charges but for his extradition hold from Idaho. He has failed to show that any of the time he served in Nevada was for his probation violation in Idaho and not for the crimes he committed in Nevada. Because he was neither in the legal nor the physical custody of the State of Idaho, Bitkoff is not entitled to credit against his Idaho probation violations for any of the time he was incarcerated in Nevada on his crimes committed in Nevada.

The recent Court of Appeals’ decision in State v. Kesling, 155 Idaho 673, 315 P.3d 861 (Ct. App. 2013), is on point. Pursuant to an interstate compact agreement, Kesling’s probation was transferred to Florida. Id. at \_\_\_, 315 P.3d at 862. While in Florida, Kesling committed several new felonies, resulting in the violation of his Idaho probation. Id. The Idaho district court issued bench warrants for the probation violations, and authorities in Florida were made aware of those warrants. Id. However, the bench warrants were not immediately served. Id. Instead, Idaho placed an extradition hold on Kesling. Id. at \_\_\_, 315 P.3d at 866. Kesling was convicted and

sentenced for his crimes in Florida and served his sentence. Id. at \_\_\_\_, 315 P.3d at 862. After he served his sentences on those crimes, he was extradited back to Idaho where he was served with the bench warrants. Id.

Kesling argued that he was entitled to credit for time served during his incarceration in Florida. Id. at \_\_\_\_, 315 P.3d at 862. The Court explained that he was not because “the record contains no evidence supporting Kesling’s assertions that he was held in Florida on the functional equivalent of an Idaho bench warrant after his Florida sentences were fully served.” Id. at \_\_\_\_, 315 P.3d at 866. There was no evidence that Kesling was held in Florida beyond the end of his sentences in that state. Id. Though Idaho placed an extradition hold on Kesling, there was no evidence that officials in Florida were keeping Kesling in custody on behalf of Idaho rather than to serve his sentences for the crimes he committed while in Florida. Id.

This case is indistinguishable from Kesling. Pursuant to an interstate compact agreement, Bitkoff’s probation was transferred to Nevada. (R., p.148.) While in Nevada, Bitkoff committed several new felonies, resulting in the violation of his Idaho probation. (R., pp.148-49; PSI, pp.123-26.) The district court issued a bench warrant for the probation violations, and authorities in Nevada were made aware of those warrants. (R., pp.167-68, 201-04.) However, the bench warrant was not immediately served. Instead, Idaho placed an extradition hold on Bitkoff, preferring to wait for the disposition of his Nevada cases. (PSI, p.125.) Bitkoff was convicted and sentenced for his crimes in Nevada and served his sentence. After he was paroled, he was extradited back to Idaho where he was served with the bench warrant. (R., pp.171, 178.)

The record contains no evidence supporting Bitkoff's assertions that he was held in Nevada on the functional equivalent of an Idaho bench warrant after his Nevada sentences were fully served. Though Idaho placed an extradition hold on Bitkoff, there is no evidence that officials in Nevada kept Bitkoff in custody on behalf of Idaho rather than to serve the sentences for the crimes he committed in Nevada. Bitkoff was in custody in Nevada serving time on convictions entered in Nevada for crimes committed while in Nevada. He is not entitled to credit for that period of incarceration.

Bitkoff also argues that the district court "erred insofar as when it perceived the question of whether Mr. Bitkoff was entitled to credit for time served as one of discretion." (Appellant's brief, pp.6-9.) The district court did no such thing. At the disposition hearing on Bitkoff's probation violations, defense counsel related that Bitkoff claimed that he was served with Idaho's bench warrant while in custody in Nevada. (Tr., p.45, Ls.17-19.) Bitkoff's counsel admitted that he did not have any proof to substantiate that claim. (Tr., p.45, Ls.15-24.) The district court, making a credibility determination, decided not to give Bitkoff the benefit of the doubt, because doing so would reward Bitkoff for his poor performance while on probation—committing several new felonies in Nevada. (Tr., p.46, Ls.2-15.)

In probation hearings, the district court may make credibility determinations. State v. Sanchez, 149 Idaho 102, 105, 233 P.3d 33, 36 (2009). The district court gave no indication that the award of credit for time served was discretionary. Rather, it correctly recognized that, without any evidence to substantiate his claim, whether Bitkoff was entitled to credit for time served while in Nevada depended upon whether his allegations were credible. The district court determined, in light of Bitkoff's abysmal

performance on probation, his allegations were not credible. Based on that determination, there was no evidence to support a grant of additional credit for time served and the district court decided that Bitkoff was not entitled to the additional credit.

The district court was correct. Bitkoff is requesting that this Court allow him to double count the time he served in Nevada on his sentence for the crimes he committed in Nevada against his sentence for his crimes committed in Idaho. Idaho Code § 19-2603 does not entitle him to double count that time. The district court correctly denied Bitkoff's motion for additional credit for time served to which he was not entitled, and the district court's order should be affirmed.

#### CONCLUSION

The state respectfully requests that this Court affirm the district court's order denying Bitkoff's motion for additional credit for time served, to which Bitkoff was not entitled.

DATED this 15th day of April, 2014.

A handwritten signature in black ink, appearing to read "Russell J. Spencer", is written over a horizontal line.

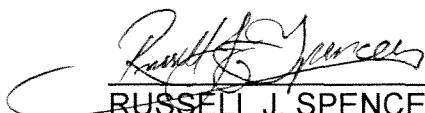
RUSSELL J. SPENCER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 15th day of April, 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SHAWN F. WILKERSON  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

  
\_\_\_\_\_  
RUSSELL J. SPENCER  
Deputy Attorney General

RJS/pm